(1)

01 471 SEP 07 2001

NO.:_____

In The

Supreme Court of The United States

IN RE: JAMES H. GUERIN,

Petitioner,

EXTRAORDINARY WRIT
OF HABEAS CORPUS

JAMES H. GUERIN
FCC-Coleman (LOW)
P.O. Box 879
Coleman, FL 33521-0879
PETITIONER

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30 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's sentence is due to be vacated where district court determined sentence in excess of the statutory maximum, under the Sentencing Guidelines, and prior to granting downward departure for substantial assistance, in light of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)?

2. Whether Petitioner's sentence is due to be vacated where district court determined Petitioner's enhanced sentence beyond the statutory maximum based on contested facts under a preponderance of evidence standard, rather than beyond a reasonable doubt, in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)?

3. Whether the *Apprendi* rule is implicated where Petitioner's sentence was determined to be above the statutory maximum based on facts not charged in the indictment or pleaded to, but, rather determined by the sentencing court under a preponderance of evidence?

4. Whether the *Apprendi* rule is implicated where Petitioner was exposed to a 30-year sentence above the statutory maximum based on the sentencing court's factual findings under a preponderance of evidence, but the actual sentence imposed after the sentencing court granted the government's § 5K1.1 motion, was below the statutory maximum?

QUESTIONS PRESENTED FOR REVIEW - Continued

5. Whether the fact that the sentencing court's finding increased the possible statutory maximum under 18 U.S.C. § 1956(a)(1)(A)(i), implicates *Apprendi*?

6. Whether the sentencing court's § 5K1.1 downward departure from determination of 30-year sentence in excess of the statutory maximum under 18 U.S.C. § 1956(a)(1)(A)(i), based on facts not charged in the indictment or pleaded to, but contested at sentencing hearing, requires vacatur of sentence due to incorrect starting point in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)?

7. Whether Petitioner voluntarily, knowingly, and intelligently *i.e.*, with a full comprehension check, waived his right to have the disputed fact of amount of money laundered which was used to increase his possible sentence, above the statutory maximum, determined by sentencing court beyond a reasonable doubt in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES v

EXTRAORDINARY WRIT OF HABEAS CORPUS ... 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Procedural History of the Case 3

B. Statement of Facts. 4

REASONS FOR GRANTING THE HABEAS PETITION 8

CONCLUSION 17

TABLE OF CONTENTS - Continued

INDEX TO APPENDICES

APPENDIX A	Opinion of the Appellate Court for the Third Circuit C.A. No. 01-1613 Entered on April 19, 2001	App. 1
APPENDIX B	Pertinent portions of text of Title 28 U.S.C. § 2241	App. 3
APPENDIX C	Pertinent portions of text of Title 28 U.S.C. § 2255	App.4
APPENDIX D	Fifth Amendment to the United States Constitution	App. 5
APPENDIX E	Sixth Amendment to the United States Constitution	App. 6

TABLE OF AUTHORITIES

SUPREME COURT CASES:

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. (2000) ..... i, ii, 1, 2, 7-16

Jones v. United States, 526 U.S. 227 (1999) 10, 16

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 10

COURT OF APPEALS CASES:

U. S. v. Camacho, 248 F.3d 1286 (11th Cir. 2001) .. 11, 12

U. S. v. Conley, 37 F.3d 970 (3rd Cir. 1994) 9

U. S. v. Doggett, 230 F.3d 160 (5th Cir. 2000) 11

U. S. v. Duarte, 246 F.3d 56 (1st Cir. 2001) 11

U. S. v. Gerrow, 232 F.3d 831 (11th Cir. 2000) 12

U. S. v. Karlic, 997 F.2d 564 (9th Cir. 1993) 16

U. S. v. Mack, 229 F.3d 226 (3rd Cir. 2000) 12

U. S. v. Morelli, 169 F.3d 798 (3rd Cir. 1999) 9

U. S. v. Nordby, 225 F.3d 1053 (9th Cir. 2000) 11

U. S. v. Paramo, 998 F.2d 1212 (3rd Cir. 1993) 9

TABLE OF AUTHORITIES - Continued

U. S. v. Ramirez, 242 F.3d 348 (6th Cir. 2001) 14

U. S. v. Rebmann, 226 F.3d 521 (6th Cir. 2000) 15

U. S. v. Rodgers, 228 F.3d 1318 (11th Cir. 2000) 11

U. S. v. Savage, 891 F.2d 145 (7th Cir. 1989) 10

U. S. v. Strayhorn, 250 F.3d 462 (6th Cir. 2001) 13, 14

U. S. v. Thomas, 246 F.3d 438 (5th Cir. 2001) 12

U. S. v. Williams, 235 F.3d 858 (3rd Cir. 2000) 12, 13

DISTRICT COURT CASES:

U. S. v. Guerin, 1998 WL 961908 ..... 1, 4, 5, 7

Young v. Conley, 128 F.Supp.2d 354 (S.D. W.Va. 2001) 12

OTHER AUTHORITIES:

17 C.F.R. § 240.10b-5 3

22 C.F.R. § 126.1 3

22 C.F.R. § 127.1 3

TABLE OF AUTHORITIES - Continued

22 C.F.R. § 127.3 3

Title 15 U.S.C. § 78j(b) 3

Title 18 U.S.C. § 2 3

Title 18 U.S.C. § 371 3

Title 18 U.S.C. § 1341 3

Title 18 U.S.C. § 1956(a)(1)(A) 9

Title 18 U.S.C. § 1956(a)(1)(A)(i) ..... ii, 3, 9

Title 21 U.S.C. § 841(b) 10

Title 22 U.S.C. § 2778(b)(2) 3

Title 22 U.S.C. § 2778(c) 3

Title 22 U.S.C. § 5067 3

Title 22 U.S.C. § 5113(b)(3) 3

Title 26 U.S.C. § 7206(1) 3

Title 26 U.S.C. § 7206(2) 3

Title 28 U.S.C. § 1651(a) 1

Title 28 U.S.C. § 2241 2

TABLE OF AUTHORITIES - Continued

Title 28 U.S.C. § 2244 4

Title 28 U.S.C. § 2255 ..... 1, 2, 4, 6

Fifth Amendment to the United States Constitution 2, 10, 14

Sixth Amendment to the United States Constitution 2, 10, 14

EXTRAORDINARY WRIT OF HABEAS CORPUS

James H. Guerin (Mr. Guerin) respectfully prays for issuance for an extraordinary writ of habeas corpus on the grounds that his sentence was illegally imposed in light of the Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). Mr. Guerin has no other means or avenue to obtain judicial relief to correct the illegal sentence and constitutional deprivations in the case *sub judice*. Absent relief from this Court, Mr. Guerin will be required to serve an additional five (5) years imprisonment - a complete miscarriage of justice.

OPINIONS BELOW

The unpublished opinion of the Third Circuit Court of Appeals denying Mr. Guerin's application for leave to file his second section 2255 petition in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), is reproduced in the Appendix A hereto. The decision of the United States District Court for the Eastern District of Pennsylvania denying Mr. Guerin's first section 2255 petition is reported at 1998 WL 961908.

JURISDICTION

This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1651(a). Mr. Guerin' s petition seeks to vacate his

illegal sentence in light of the recent decision by the Court in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), and new rule of constitutional law established therein. Mr. Guerin further submits: 1) that the granting of the instant habeas petition will be in aid of the Court's appellate jurisdiction since there is a definitive split among the federal courts on the questions presented herein; 2) there are exceptional circumstances warranting the exercise of the Court's discretionary powers; and 3) that adequate relief cannot be obtained in any other form or from any other court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Title 28 U.S.C. § 2241, § 2255, and the Fifth and Sixth Amendments to the United States Constitution are set forth in Appendix B, C, D, and E, respectfully.

STATEMENT OF THE CASE

This case raises in the most direct and unambiguous form the constitutional questions discussed, but left unanswered in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000): the constitutional aspects to the right to have critical facts which have the *potential* of increasing the sentence above the statutory maximum, proven beyond a reasonable doubt. Further, the case asks whether Congress can

require that a federal judge decide, by a preponderance of evidence, an element of an offense to which a defendant does not plead guilty, but, rather affirmatively contests and claims he or she is actually innocent.

A. Procedural History of the Case

In October 1991, a federal grand jury for the Eastern District of Pennsylvania indicted Mr. Guerin on the following criminal charges: (Count 1) Conspiracy, 18 U.S.C. § 371; (Count 2) Mail Fraud, 18 U.S.C. § 1341; (Count 3) Securities Fraud, 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5; (Count 4) Money Laundering, 18 U.S.C. § 1956(a)(1)(A)(i); (Count 5) AntiApartheid Act Violations, 22 U.S.C. §§ 5067 and 5113(b)(3); 18 U.S.C. § 2; 22 C.F.R. §§ 126.1 and 127.3; (Count 6) Arms Export Control Act Violations, 22 U.S.C. §§ 2778(b)(2) and 2778(c); 18 U.S.C. § 2; 22 C.F.R. §§ 127.1 and 127.3; (Count 7) Filing a False Income tax Return, 26 U.S.C. § 7206(1); and (Count 8) Filing a False Corporate Tax Return, 26 U.S.C. § 7206(2).

On December 4, 1991, the Government filed a superceding indictment which was done to comport with Petitioner's claim that he laundered $970,000.00, not hundreds of millions as initially alleged in the indictment by the Government.

On December 5, 1991, Petitioner pleaded guilty to the charged offenses pursuant to a written plea agreement. On June 10, 1992, the district court sentenced Petitioner to a term of 30-years imprisonment, however, the sentence was reduced pursuant to the granting of the Government's § 5K1.1 motion sentence reduction, to 15-years imprisonment. No appeal was taken to the Third Circuit Court of Appeals.

In 1998, the district court denied Petitioner's initial section 2255 petition, wherein Petitioner claimed his counsel rendered ineffective assistance for failing to file a notice of appeal after the imposition of sentence. *Guerin*, 1998 WL 961908.

On April 19, 2001, the Third Circuit Court of Appeals denied Mr. Guerin's application pursuant to 28 U.S.C. § 2244 and § 2255 to file a second or successive motion under 28 U.S.C. § 2255. Appendix A(1).

Mr. Guerin is currently serving his federal sentence at FCC-Coleman (LOW), a federal correctional institution located in Coleman, Florida. The custodian is R.D. SWOPE, Warden.

B. Statement of Facts.

After the Government indicted JAMES H. GUERIN ("Petitioner") on a series of criminal charges, Petitioner and his counsel entered into plea negotiations with the Government. At issue between the parties was the amount of money Petitioner was alleged to have laundered. Petitioner contended he laundered $970,000.00 (US) during the course of the offenses, whereas the Government took the position, as alleged in the indictment, he laundered in excess of $9,000,000.00 (US). "As a result of Petitioner's attorney's efforts, the government redrafted the money laundering count in its indictment. Thus, where the original money laundering count involved a $9,000,000.00 transfer from a Swiss bank to a United Kingdom bank, the redrafted money laundering count involved $970,000.00 in transfers between banks located within the United States. On December 4, 1991, the government filed a superseding indictment which stated the

redrafted money laundering count. On December 5, 1991, Petitioner pleaded guilty to the charges against him." *United States v. Guerin*, 1998 WL 961908.

However, prior to pleading guilty, the district court acknowledged that Petitioner contested the amount of money alleged to be laundered by him as proffered by the Government. In response to the court's request that the Government render an assessment under the sentencing guidelines of what it thought the sentence would be if there was a guilty plea to all eight counts in the indictment, the Government stated, in pertinent part:

> "We have advised the defense, that by certain calculations in this case, particularly money laundering guidelines, that if certain conclusions are made and **certain facts are determined by the Court,** the guidelines for Mr. Guerin could be as high as 365 months to life, that's without acceptance of responsibility with a two level departure for acceptance of responsibility it would be 292 years to, I'm sorry 292 months to 365 months.
>
> Money laundering is the most serious of offenses, by calculation, we calculated all the subgrouped, the criminal activity, and money laundering is the highest."

PLEA HEARING TRANSCRIPTS, p. 46.

The district court later informed Petitioner:

> "We don't know where that [sentence] will be on the scale until we get all the facts . . . I can't tell you what the sentence will be. I

> simply don't know, no one knows now until we have the [presentence] investigation."

Id. at pp. 47-48.

Thereafter, the prosecutor summed up "how severe the guidelines will be if certain [factual] determinations are made." *Id.* at 48. "If the Court were to determine that Mr. Guerin was the leader under the enhancement sections of the guidelines, [or] determine that Mr. Guerin obstructed justice . . . [or] determine that more than 100 million dollars was involved, the offense level would be . . . level 42, which is the 360 months to life." *Id.* at pp. 48-49. The hearing was concluded after the district court accepted Petitioner's guilty plea.

At sentencing, the Government claimed that Petitioner had laundered, during the course of the offenses, in excess of $100,000,000.00 (US). Petitioner objected to the Government's claims heretofore described, and claimed that he laundered $970,000.00 (US) in the offense. After a lengthy two-day sentencing hearing, the district court, under a preponderance of evidence standard, overruled Petitioner's objections to the amount of money laundered, and sided with the Government. The district court further determined, under the same standard of proof described above, that Petitioner's sentence must also be enhanced based on the fact that he was a leader and had obstructed justice during the course of the offense.[1]

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As noted in Judge Bechtle's memorandum and order denying Mr. Guerin's section 2255 petition, "[o]ne of the legal issues that existed at the

Based on a determination of the above facts (enhancements as prescribed under the sentencing guidelines), the district court determined Petitioner's guideline range to be 360 months to life. The court then determined that Petitioner's sentence would be at the low end of the guideline range - 360-months imprisonment - ten years in excess of the statutory maximum sentence under the money laundering count (18 U.S.C.§ 1956). *See SENTENCING TRANSCRIPTS*, (June 10, 1998), p.57.

After determining Petitioner's ultimate sentence, the district court then entertained the Government's § 5K1.1 motion for reduction of sentence, based on Petitioner's substantial assistance and cooperation to the Government. The court concluded that Petitioner's efforts were deserving of a 50% sentence reduction. The court then granted the Government's § 5K1.1 motion and reduced Petitioner's 30-year sentence to 15-years. *Id.*

On June 26, 2000, the Supreme Court decided *Apprendi v. New Jersey*, 503 U.S. 466, 120 S.Ct. 2348 (2000) which established a new rule of constitutional law: "other than the fact of a prior conviction, any fact that increases the

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time of Petitioner's sentencing was the amount of money that would be considered by the court in applying the Guidelines. Petitioner's counsel took the position that the amount alleged in the money laundering count, $970,000.00, should control. The government took the position that the entire amount of money alleged - several hundred million dollars - should control because it could be considered through the conspiracy count against Petitioner." 1998 WL 961908 *7.

penalty for a crime beyond the prescribed statutory maximum must be [charged in the indictment,] submitted to a jury and proven beyond a reasonable doubt." *Apprendi*, 120 S.Ct. at 2362-63.

REASONS FOR GRANTING THE HABEAS PETITION

It is axiomatic that this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), resolved some monumental issues regarding the allocation of fact-finding between judge and jury as well as when a sentencing factor transforms into an offense element. Nevertheless, the precise constitutional parameters of *Apprendi* were left unclear because it was unnecessary to resolve that question. The instant case raises two possible interpretations of *Apprendi*, each of which would be sufficient to decide this case, but each of which would both solidify and clarify the constitutional basis of *Apprendi*.

1. any fact which exposes a defendant to a sentence above the statutory maximum must be decided by a jury, or in a case where a defendant pleads guilty and disputes the fact, by the sentencing court, beyond a reasonable doubt;

2. any fact determined by the district court which increases the possible statutory maximum sentence must be proven beyond a reasonable doubt.

Whichever direction this Court elects to proceed regarding the questions presented will provide unambiguous guidance to all of the state and federal courts below who are struggling, with judicial equivocation with the impact of the new rule of constitutional law established in *Apprendi* and the many instances where it is implicated.

"[Title 18] Section 1956(a)(1)(A)(i) makes it unlawful to conduct a financial transaction involving the proceeds of unlawful activity with the intent to promote the carrying on of specified unlawful activity." *United States v. Paramo*, 998 F.2d 1212, 1216 (3rd Cir. 1993). The penalty for violating § 1956(a)(1)(A)(i) is "a fine not more than $500,000.00 or twice the value of property involved in the transaction whichever is greater, or imprisonment for not more than twenty years, or both." 18 U.S.C. § 1956(a)(1)(A). Nowhere does the statute prescribe an amount of money that a person intends to launder; that is, the amount of money laundered or attempted to launder was not made an offense element by Congress when it created the criminal statute.

Federal courts have interpreted the money laundering statute on numerous occasions in order to make clear the proscribed offense elements. *See, e.g., United States v. Conley*, 37 F.3d 970 (3rd Cir. 1994); *United States v. Paramo*, 998 F.2d 1212 (3rd Cir. 1993); *United States v. Morelli*, 169 F.3d 798 (3rd Cir. 1999). Never did the courts hold that the amount of money laundered or attempted to be laundered was an offense element.

Rather, Congress decided by and through its creation of the Sentence Reform Act of 1984 ("Act"), that certain facts relating to the criminal offense could authorize a district court to impose a sentence beyond the statutory maximum without charging the particular fact in the indictment. The district courts were directed to decide those facts which expose a defendant to a sentence beyond the statutory maximium, under a prepoderance of evidence standard at the penalty phase. *See,*

e.g., United States v. Savage, 891 F.2d 145, 146-47 (7th Cir. 1989)(drug quantities and type were sentencing factors subject to proof by preponderance of evidence).

Following the creation of the Act, this Court held that factors that establish a mandatory minimum sentence under Title 21 U.S.C. § 841(b), need not be proven to a jury beyond a reasonable doubt as elements of the offense. *See, McMillan v. Pennsylvania*, 477 U.S. 79 (1986). As a result of *McMillan*, the term "sentencing factor" was coined.

As time went on, so did the challenges to the distinction between "elements" of an offense and "sentencing factors". It was not until this Court's decision in *Jones v. United States*, 526 U.S. 227 (1999), did the unanimous view of the courts regarding the distinction between offense elements and sentencing factors change. In what, in criminal law circles, became famous dicta, the Court included the following language in a footnote: "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243 n.6.

On June 26, 2000, the Court decided *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), in which it made the dicta in *Jones* a holding. Id., 530 U.S. at ____, 120 S.Ct. at 2356("In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in Jones.... 'It is unconstitutional for a

legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is **exposed.** It is equally clear that such facts must be established by proof beyond a reasonable doubt.'")(citation omitted). Perhaps more succinctly, *Apprendi* establishes that "the right to trial by jury . . . guarantee[s] - what it has been assumed to guarantee throughout our history - the right to have a jury determine those facts that determine the maximum sentence the law allows." *Id.*, at 2358. (Scalia, J., concurring). That *Apprendi* was intended to have a far-reaching impact is unmistakable, as indicated by Justice O'Connor's dissenting opinion which states that the majority's decision "will surely be remembered as a watershed change in constitutional law." *Id.* at 2365 (O'Connor, J., dissenting).

Following *Apprendi*, federal courts began to determine the reach of the new rule of constitutional law in criminal cases. For example, some courts have held that *Apprendi* does not affect a judge's ability to determine the quantity of drugs in formulating the appropriate sentencing range under the Guidelines as long as the sentence is limited to the statutory maximum. *See United States v. Doggett*, 230 F.3d 160, 166 n.3 (5th Cir. 2000); *United States v. Nordby*, 225 F.3d 1053, 1058 (9th Cir. 2000); *United States v. Rodgers*, 228 F.3d 1318, 1326-28 (11th Cir. 2000); *United States v. Camacho*, 248 F.3d 1286, 1288 (11th Cir. 2001); *United States v. Duarte*, 246 F.3d 56, 63 (1st Cir. 2001).

Yet other federal courts have concluded that *Apprendi* is implicated where a defendant is exposed to a sentence beyond the statutory maximum based on the district court's

findings at sentencing. *See United States v. Thomas*, 246 F.3d 438, 439 (5th Cir. 2001)("Because amount of crack defendant possessed with intent to distribute was a fact that increased the penalty for her crime beyond the prescribed statutory maximum . . . judge using preponderance of evidence standard, was unconstitutional under *Apprendi*."); *Young v. Conley*, 128 F.Supp.2d 354, 356 (S.D.W.Va. 2001)("[A]ll appeals courts to consider the issue have held, pursuant to *Apprendi*, that where findings of particular drug quantities **could expose** defendants to imprisonment penalties greater than twenty years, the drug quantity must be treated as an element, charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt.")(collecting cases omitted). However, some federal courts have held "a defendant may obtain re-sentencing under *Apprendi* only if the sentence he **actually** receives exceeds the maximum allowable." *United States v. Camacho*, 248 F.3d 1286, 1288 (11th Cir. 2001); *see also United States v. Gerrow*, 232 F.3d 831, 834 (11th Cir. 2000); *United States v. Williams*, 235 F.3d 858 (3rd Cir. 2000); *United States v. Mack*, 229 F.3d 226 (3rd Cir. 2000).

The Third Circuit in *Williams*, *supra*, was asked to decide "whether the fact that the District Court's finding increased the possible statutory maximum . . . implicates *Apprendi*." *Id.* at 863. Answering in the negative, the court opined that "[i]n *Apprendi*, the Court was ambiguous as to whether its holding should apply in such a situation." *Id.* Interpreting the Court's statement in *Apprendi* "'that nothing in this history suggests that it is impermissible for judges to

exercise discretion imposing a judgment within the range prescribed by statute[,]'", *Id.* (*citing* 120 S.Ct. at 2358), the *Williams* panel held "[t]his statement to suggest[] that a District Court's sentence that is under the statutory maximum cannot be constitutionally objectionable under *Apprendi*." *Id.*[2]

A recent case decided by the Sixth Circuit demonstrates how far apart the circuit courts are on the reach and impact of *Apprendi*. *See United States v. Strayhorn*, 250 F.3d 462 (6th Cir. 2001). In *Strayhorn*, the court held that *Apprendi* teaches several principal lessons:

> first, that "[t]he offense charged in an indictment must be stated with sufficient 'certainty and precision' so that there can be no doubt as to the judgment which should be given if the defendant is convicted;" second, that "courts must count any 'fact' that increases the 'penalty beyond the prescribed statutory maximum' as an element of the offense 'except for one important exception,' *i.e.* 'the fact of a prior conviction;'" and third, "that it 'is unconstitutional for a legislature' to treat 'facts that increase the prescribed range of penalties

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In *Williams*, the court conceded that by the formulations established by this Court in *Apprendi*, "it could be argued that the *Apprendi* rule does apply to Williams, because the District Court's finding increased the 'prescribed range of penalties' and the 'maximum penalty' to which Williams was exposed, even though his actual penalty did not exceed 20-years." 235 F.3d at 863.

> to which a criminal defendant is exposed' as mere sentencing factors, rather than facts to be established as elements of the offense." *United States v. Ramirez*, 242 F.3d 348, 350-51 (6th Cir. 2001)(citations omitted).

Id. at 467.

In following the instructions of the Court in *Apprendi*, the *Strayhorn* court held "the district court's drug quantity relevant conduct finding violated defendant's Fifth and Sixth Amendment rights under *Apprendi*, though it did not exceed the default statutory maximum for a defendant. . ." *Id.* at 462.

In Mr. Guerin's case, he pleaded guilty to a specific offense element, *i.e.*, money laundering in the amount of $970,000.00. To obtain his guilty plea, the Government had to amend the indictment to delete the fact that Mr. Guerin allegedly laundered hundred of millions and insert the amount of $970,000.00. At sentencing, the Government nonetheless pressed on with its original allegation that Mr. Guerin laundered in excess of 400-million dollars. Under the preponderance of evidence standard, and after a contested hearing on the matter, the district court agreed. In doing so, the court determined Mr. Guerin's guideline range to be 360-months to life imprisonment. The court then determined his sentence to be 30-years. Although the Government's motion for a sentence reduction pursuant to § 5K1.1 U.S.S.G. was later granted, reducing Mr. Guerin's sentence to fifteen (15) years, Mr. Guerin nevertheless did not waive his right to have that offense element decided beyond a reasonable doubt by the sentencing court, knowingly, voluntarily, or intelligently, *i.e.*,

with a full comprehension check. *See United States v. Rebmann*, 226 F.3d 521, 521 n.2 (6th Cir. 2000)("Although defendant who pleaded guilty . . . waived right to jury trial on issue of whether distribution of heroin caused death, so as to trigger . . . increased punishments . . . defendant did not waive right to have court decide beyond a reasonable doubt issue of whether death resulted from distribution.").

Of course, had the Government been required to prove beyond a reasonable doubt that Mr. Guerin laundered in excess of 400 million dollars during the course of the offense, the Government would have failed. Moreover, the district court's determination that Mr. Guerin's sentence was 30-years in excess of the prescribed statutory maximum under the money laundering statute, clearly established an *Apprendi* violation.

Had *Apprendi* been decided at the time of Mr. Guerin's sentence, the district court would have been required to first determine Mr. Guerin' s sentence within the prescribed statutory maximum range of 20-years, not the applicable guideline range of 360-months to life imprisonment. After reaching the maximum of 20-years, the court would have been required to downward depart from that point, which in the instant case, would have resulted in a sentence of 10-years imprisonment.[3] This difference of five years, considering Mr. Guerin's advanced age and medical condition, means leaving

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A district court's downward departure from incorrect starting point in determination of sentence is plain error requiring remand. *United States v. Karlic*, 997 F.2d 564, 567-68 (9th Cir. 1993).

the prison setting on his own accord or via a gurney. Additionally, Mr. Guerin would not have been saddled with the increased social opprobrium that accompanies the higher degree of criminal culpability assigned to him.

There is absolutely no other judicial avenue or means available to have his habeas claims reviewed and the relief granted other than the presentment of the instant petition in this Court.

Whatever the precise limits of *Apprendi*, the cloud which has overhung judicial and jury power since *Jones* and *Apprendi*, has not dissipated, but broadened, creating further conflict among the federal courts. At least so far as this case raises the precise boundries of that decision, its resolution would promote stability and certainty in hundreds of cases involving a plethora of statutes in this country. For that reason, the Court should grant the writ, and hear the merits of this case.

CONCLUSION

Based on the foregoing, Mr. Guerin respectfully requests that the Court grant the instant habeas petition based on the foregoing extraordinary circumstances, facts and law; and enter an order granting same and remanding the case to the district court for re-sentencing. Mr. Guerin requests other and further relief this Court may deem proper and just.

Respectfully submitted,

JAMES H. GUERIN
FCC-Coleman (LOW)
P.O. Box 879
Coleman, FL 33521-0879

PETITIONER.

Assisted by:
Chris Mylett
Paralegal Specialist.

APPENDIX

APPENDIX A

APS-164 April 19, 2001

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **01-1613**

IN RE: JAMES H. GUERIN,
Petitioner

Present: SLOVITER, BARRY, AND AMBRO, CIRCUIT JUDGES

Submitted are:

(1) Petitioner's application pursuant to 28 U.S.C. § 2244 and § 2255 to file a second or successive motion under 28 U.S.C. § 2255; and

(2) Petitioner's amendment thereto in the above-captioned case.

Respectfully,

Clerk

MMW/JDM

ORDER

The foregoing application is denied. Petitioner, James H. Guerin, pled guilty in 1991 to, inter alia money laundering in

violation of 18 U.S.C. § 1956(a)(1)(A)(i), and he was sentenced to 15 years imprisonment for that conviction. The statutory maximum for the conviction was "not more than twenty years...." 18 U.S.C. § 1956(a)(1). Petitioner seeks permission to attack the constitutionality of the sentence based on Apprendi v. New Jersey, 530 U.S. 466 (2000), where the Court held that the Constitution requires that any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond reasonable doubt. Permission to file a "second or successive" § 2255 motion may be granted only if the applicant makes a prima facie showing of reliance upon a relevant "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 2255; see § 2244(b)(3)(C). Assuming arguendo that the Apprendi rule even applies to cases on collateral review, petitioner's reliance on Apprendi i&misplaced, as he was not sentenced above the statutory maximum for his offense. Although petitioner may have been exposed to a possible sentence above the maximum based on the District Court's factual findings at sentencing, the actual sentence imposed, after the District Court granted the government's § 5K1 .1 motion, was below the statutory maximum. Consequently, the Apprendi rule is not implicated here. See United States v. Williams, 235 F.3d 858 (3rd Cir. 2000).

APPENDIX B

TITLE 28 U.S.C. § 2241

Section 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless -

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof;

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APPENDIX C

TITLE 28 U.S.C. § 2255

Section 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * * * * * *

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain -

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

APPENDIX D

U.S. CONSTITUTION: FIFTH AMENDMENT

Fifth Amendment - Rights of Persons

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; . . .

APPENDIX E

U.S. CONSTITUTION: SIXTH AMENDMENT

Sixth Amendment - Rights of Accused in Criminal Prosecutions

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.